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No. 92-482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER THE CHASE MANHATTAN BANK, N.A.

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Statutes:

12 U.S.C. § 24 (Seventh)	*passim*
12 U.S.C. § 92	*passim*

SUPPLEMENTAL BRIEF OF PETITIONER THE CHASE MANHATTAN BANK, N.A.

Petitioner The Chase Manhattan Bank, N.A. ("Chase")[1] submits this Supplemental Brief to advise the Court regarding appropriate disposition of the petition in this case in light of the decision earlier this week in the related case of *United States National Bank of Oregon et al.* v. *Independent Insurance Agents of America, Inc. et al.*, Nos. 92-484 & 92-507. The decision in *United States National Bank*, far from disposing of the critical issue presented in this case (on which the circuits are divided), makes it all the more urgent for this Court to resolve.

The petitions of Chase, No. 92-482, and of the Office of the Comptroller of the Currency ("OCC"), No. 92-645, present a conflict among the courts of appeals as to the meaning of a provision of the National Bank Act that formerly was codified at 12 U.S.C. § 92 ("Section 92"). On December 14, 1992, this Court apparently delayed action on our petition in order to decide in *United States National Bank of Oregon et al.* v. *Independent Insurance Agents of America, Inc. et al.*, Nos. 92-484 & 92-507, *cert. granted* that date, the predicate question whether Section 92 was repealed in 1918. On June 7, 1993, this Court held in that case that Section 92 continues to exist.

Now that the Court has determined that Section 92 exists, the way is clear to resolve the issue presented in the present case—whether Section 92 is a grant of insurance agency powers "in addition to" those powers incidental to banking transactions granted by Section 24 (Seventh) of Title 12 (as the D.C. Circuit has held and the plain language of Section 92 indicates), or instead

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[1] Chase's parent and non-wholly owned subsidiary corporations are listed at page ii of the petition.

impliedly bars the exercise of the powers granted by Section 24(Seventh) (as the Second Circuit held below). Consistent with the position of the OCC as affirmed by the D.C. Circuit, this Court's decision in *United States National Bank* characterizes Section 92 as "*granting* powers of insurance agency to some national banks." *Slip op.* 22 (emphasis added). As the Solicitor General stated in the OCC's petition as to this issue, review of the Second Circuit's decision "is warranted because of the conflict, because the decision below is wrong, and because the decision below calls into question a variety of activities performed by national banks." OCC Pet. 9.

1. *The issue is of tremendous commercial importance to the banking industry.* While the question resolved by the Court in *United States National Bank of Oregon* as to the continued existence of Section 92 is perhaps of greater abstract intellectual interest, the conflict presented by the present case regarding the meaning of Section 92 is of far greater practical significance. The general insurance agency powers that Section 92 grants to national banks located in small towns is of little importance to the vast majority of the citizenry. Of far greater commercial importance is whether Section 92 impliedly limits the incidental insurance agency powers granted by Section 24(Seventh).

Over the past four decades, the OCC has ruled that certain specific forms of insurance agency sales activities, such as sales of title insurance, credit life insurance, municipal bond insurance, and annuities, are incidental to banking and therefore authorized for all national banks under Section 24(Seventh). Pursuant to these determinations, national banks for decades have engaged in various insurance activities that are incidental to the business to banking. Chase Pet. 14-18. OCC Pet. 17-18. The nationwide injunction sought by ALTA, which would bar the OCC from approving title insurance agency activities by any national bank, would obviously have a signifi-

cant impact upon the current and future operations of all national banks nationwide.[2]

2. *The Courts of Appeals are divided on whether Section 92 imposes a ban on all insurance agency sales by banks located in towns of more than 5,000 persons.* The decision of the Second Circuit below lays down a *per se* rule that every insurance agency activity by a national bank not expressly permitted by Section 92 is prohibited. Relying upon the 1968 decision of the Fifth Circuit in *Saxon* v. *Georgia Association of Independent Insurance Agents*,[3] which ruled that " 'national banks have *no power* to act as insurance agents in cities of over 5,000 population,' "[4] the Second Circuit held that the language of Section 92:

> makes inescapable the conclusion that Congress intended this provision to apply to "*any . . . insurance company*," and a title insurance company surely is an insurance company. Thus, Section 92 impliedly bars national banks from engaging in the title insurance agency business.[5] (Emphasis added.)

The Second Circuit *refused* even to consider whether, because of its particularly close relationship to the mortgage lending business of national banks, title insurance agency business is authorized by 12 U.S.C. § 24(Seventh) as incidental to the business of banking. Chase Pet. App. 15a-16a.

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[2] As noted by the American Bankers Association in its *amicus* brief, these provisions of the National Bank Act have an impact on the powers of state-chartered banks as well, as a result of "borrowing" statutes in 38 states upon which state banks rely for their powers. ABA Br. at 12.

[3] 399 F.2d 1010 (5th Cir. 1968).

[4] Chase Pet. App. 13a (emphasis added).

[5] Chase Pet. App. 14a.

In contrast, the District of Columbia Circuit held in *Independent Bankers Association* v. *Heimann*,[6] that Section 92 does not restrict a national bank's authority to sell credit life insurance in towns and cities of more than 5,000 persons. It held that the sale of that type of insurance is incidental to banking and thus authorized by Section 24(Seventh), and that the provisions of Section 92 authorizing the sale of *any* type of insurance, incidental to banking or not, in towns of less than 5,000 people, did not restrict the incidental insurance agency powers granted to national banks generally by Section 24(Seventh). 613 F.2d 1170.

The ruling of the Second Circuit below, adopting a *per se* bar on any national bank insurance agency activities outside of small towns, simply cannot be reconciled with the decision of the District of Columbia Circuit in *Heimann* authorizing national banks to act as agent in the sale of credit life insurance at any location. As the Solicitor General stated, "if Section 92 impliedly bars national banks from selling insurance, it bars them from selling credit life insurance. . . . In fact, the Second Circuit's analysis is entirely incompatible with the D.C. Circuit's holding in *Heimann*." OCC Reply Br. 5. As stated by the Solicitor General, "the conflict between the Second and the D.C. Circuits over the effect of Section 92 is of sufficient importance to warrant resolution by this Court." OCC Pet. 16.

3. *The conflict is overdue for decision.* The OCC's interpretation that Section 92 is a *grant* of additional powers rather than a limit on the incidental powers of Section 24(Seventh) dates back some thirty years or more. The Fifth Circuit decided the *Saxon* case against the OCC on this issue 25 years ago. The D.C. Circuit decided this same issue in favor of the OCC in *Heimann*, and contrary to the Fifth Circuit, fourteen years ago.

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[6] 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

Subsequent decisions by the Eighth Circuit,[7] the D.C. Circuit,[8] the California State Court of Appeal,[9] and the decision of the Second Circuit below have divided between the Fifth Circuit and D.C. Circuit approaches. Twenty-five years and six appellate decisions by five separate courts is percolation enough for any question. It would have been enough even had the issue as to the continued existence of Section 92 never been raised.[10] It would be appropriate at this date for the Court to grant the petitions for *certiorari* and resolve now the question whether Section 92 is a grant of powers in addition to those established by Section 24(Seventh) or is instead a limitation upon the incidental powers granted by Section 24(Seventh).

4. *The Second Circuit decision is internally inconsistent.* In addition to being in conflict with the decisions of other courts, the Second Circuit decision is internally inconsistent. The Second Circuit refused to reach the question whether the nature of title insurance causes it to be incidental to banking and therefore authorized under Section 24(Seventh), holding instead that Section 92 imposes a complete ban on all forms of insurance sales by national banks regardless of whether incidental to banking or not. Chase Pet. App. 15a-16a. Yet the Second Circuit purported to distinguish away the conflict with *Heimann* by claiming that credit life insurance is more closely incidental to banking than is title in-

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[7] *Independent Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) (deciding a similar issue under the Bank Holding Company Act and stating its disagreement with the Fifth Circuit's reading of Section 92).

[8] *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[9] *Sanford* v. *Garamendi*, 284 Cal. Rptr. 897 (Cal. App. 1991) (interpreting similar provision of state law).

[10] All of the federal cases just recounted assumed that Section 92 existed.

surance. Chase Pet. App. 14a-15a. As the Solicitor General states in his petition, however, under the Second Circuit's "interpretation of Section 92 [this] asserted distinction is irrelevant, since whatever their differences, both title insurance and credit life insurance are forms of insurance." OCC Pet. 11.

5. *The Second Circuit departed from the teachings of Chevron.* The OCC's determination is entitled to deference from the courts under *Chevron* and its progeny. *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987). While recognizing that Section 92 "obviously provides no explicit limitation on national bank activity" Chase Pet. App. 11a, the Second Circuit nonetheless held under the maxim "*expressio unius est exclusio alterius*" that the statutory language is clear and that therefore *Chevron* did not require the court to defer to the OCC's construction of the National Bank Act.

There are two fundamental flaws in the Second Circuit's decision to ignore *Chevron*. First, the opening words of Section 92 are "[t]hat in addition to the powers now vested by law in national banking associations . . . ." That statutory language plainly states that Section 92 is a grant of additional powers, not a limit upon powers granted by other provisions of the National Bank Act. That language displaces any vestige of the *expressio unius* doctrine.[11]

Moreover, even were that language not a part of Section 92, the *expressio unius* maxim does not override this Court's decisions in *Chevron* and *Clarke*. As this Court has previously noted, the *expressio unius* maxim "is a questionable one in light of the dubious reliability

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[11] *Cf. Crosby* v. *United States*, 113 S.Ct. 748 (1993) (interpreting Fed. R. Crim. Proc. 43 and holding that "express use of a limiting phrase" in the Rule established that "the language and structure of the Rule could not be more clear" thus rendering resort to the *expressio unius* maxim unnecessary).

of inferring specific intent from silence." [12] If the statute here were silent—as it is *not*, given the "in addition to the powers" language—statutory silence would trigger both application of the *expressio unius* maxim and deference to the administrative interpretation under *Chevron*. But it is in the case of statutory silence that administrative agencies are called on to exercise their *Chevron*-recognized powers to interpret the statutes they administer. Use of *expressio unius* to displace an administrative agency's interpretation of an ambiguous statute undermines the whole purpose of *Chevron*.

CONCLUSION

For the reasons stated herein and in our petition and reply brief, and for the reasons stated by the Solicitor General, the petition for *certiorari* should be granted.

Respectfully submitted,

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[12] *Pauley* v. *BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2537-38 (1991) (quoting Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n. 182 (1990)); *accord*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23 (1983). As stated by the Solicitor General, "the enactment of Section 92 just shows that Congress thought that national banks could not engage in a general insurance agency practice; it does not show that Congress thought that national banks were prohibited from selling products (like title insurance) that the Comptroller of the Currency has determined are 'incidental' to 'the business of banking.'" OCC Reply Br. 3.